71-1688

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .....

JEAN D. MUIRHEAD,
Petitioner,

vs.

HINDS COUNTY DEMOCRATIC EXECUTIVE COMMITTEE,
JOHN HULSEBOCH, Successor to J. M. DITTO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Mississippi

MERRIDA P. COXWELL
506 South President Street
Jackson, Mississippi 39201
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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INTRODUCTORY STATEMENT

Petitioner, Jean D. Muirhead, respectfully petitions for a writ of certiorari to review a judgment and order made by the Supreme Court of the State of Mississippi unofficially reported as **Hinds County Democratic Executive Committee, James Ditto, Chairman v. Mrs. Jean D. Muirhead**, 259 So. 2d 692 (1972), overturning a judgment for petitioner made and entered by the Circuit Court, First Judicial District, Hinds County, Mississippi, on July 23, 1971, reprinted herein as Appendix A.

The opinion of the Mississippi Supreme Court is reprinted herein as Appendix B.

The decision of the Mississippi Supreme Court was handed down on March 20, 1972, and is reprinted herein as Appendix C.

Petition for rehearing was denied on April 10, 1972, and the judgment denying a rehearing is reprinted herein as Appendix D.

JURISDICTIONAL STATEMENT

Petitioner believes this Court has jurisdiction to review the decision by Writ of Certiorari by virtue of 28 USC 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Mississippi Supreme Court, in deciding a case involving election questions, can refuse to take cognizance of the 1965 Federal Voting Rights Act.

2. Whether the Mississippi Supreme Court, in deciding an election case, can refuse to take cognizance of a violation of an injunction governing Mississippi elections issued by a three-judge federal panel.

3. Whether, without notice or any semblance of due process, one can, without knowledge, waive one's constitutional rights.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case involves denial of due process to a candidate for public office by a local Democratic executive committee which denied petitioner a place on the August 1971 Democratic primary ballot on the ground that she failed to complete a form submitted to her by the committee. Also involved is the question of whether there was a violation of a federal injunction in effect at the time of the election here in question prohibiting any variation in the manner Mississippi elections were held without prior approval of the U. S. Attorney General or the United States District Court for the District of Columbia.

This case was initiated when petitioner filed with the Hinds County Circuit Court, First Judicial District, a petition for a writ of mandamus, seeking to compel the Hinds County Democratic Executive Committee to place petitioner's name on the August 1971 Democratic primary ballot.

Petitioner had met all constitutional and statutory requirements for qualifying as a candidate in said primary. Respondents then mailed to petitioner a form reprinted herein as Appendix F requesting certain information, which form had never been used before; had not been authorized by the State Democratic Convention as required by state law; and had not been approved by appropriate federal authority as required by a federal injunction governing Mississippi elections and the Voting Rights Act of 1965.

Further, petitioner was never informed that completion of the form was a prerequisite to having her name placed on the ballot.

On June 15, 1971, four days before the qualifying deadline, respondents met and voted unanimously not to place petitioner's name on the ballot. This action was taken

without notice to petitioner and without opportunity for her to appear before respondent. On the last day for qualifying as a candidate, petitioner, having learned unofficially that respondents had refused to place her name on the Democratic primary ballot, qualified to run as a Republican; an act which is not prohibited by Mississippi election laws.

At the hearing on petitioner's petition for writ of mandamus, some of respondents' witnesses attempted to assert as their reason for refusing to place petitioner's name on the ballot that petitioner was a member of the Republican Party, but the trial judge ruled that the respondents' minutes reflected as their reason that petitioner had failed to complete the aforementioned form, and that respondents were bound thereby.

After a full hearing, the trial court entered its order compelling respondents to place petitioner's name on the ballot and denied respondents' oral motion for supersedeas on the ground that the election was only eleven days away. Respondents, without notice to petitioner, and contrary to Rule 32 of the Mississippi Supreme Court, reprinted herein as Appendix E, obtained supersedeas from a Mississippi Supreme Court Justice.

In petitioner's brief to the Mississippi Supreme Court on appeal, substantial federal questions were reiterated. In its opinion, the Mississippi Supreme Court did not make any mention of the federal questions other than to say, in passing, that petitioner had waived her constitutional rights. Violations of the 1965 Federal Voting Rights Act and an injunction issued by a three-judge federal panel under said act were not dealt with in the Mississippi Supreme Court's opinion.

A petition for rehearing was denied, and petitioner, having exhausted her state remedies, petitions this Court for certiorari.

REASONS FOR GRANTING THE WRIT

The decision rendered by the Mississippi Supreme Court is in conflict with decisions of this Court. This case is of particular importance in view of this Court's decisions in **Allen v. State Board of Elections**, 393 U.S. 544, 89 S. Ct. 431 (1971); **Estes v. Texas**, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1966); **Giaccio v. Pennsylvania**, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966); **Glasser v. United States**, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457 (1942); **Brookhart v. Janis**, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966).

ARGUMENT

A. The Judgment Below Ignores Petitioner's Rights Under the Fourteenth Amendment

What the record in this case discloses is that the Mississippi Supreme Court sustained the action of a quasi-governmental body, the Hinds County Democratic Executive Committee, which had utterly deprived petitioner of any semblance of due process. The Mississippi Supreme Court on appeal only briefly addressed itself to one of the federal questions properly presented to it, ignoring other federal questions. Petitioner takes issue with the Mississippi Supreme Court's finding that she received due process, and would show that other federal questions should have been answered.

In its opinion, the Mississippi Supreme Court said, "The appellee (petitioner here) was afforded due process of law. . . ." Petitioner would respectfully call this Court's attention to the fact that there was a complete denial of due process in that she was not notified her right to appear on the ballot was being challenged, she was not afforded a hearing before respondents, and in fact, was never officially notified of respondents' action in refusing to place her name on the ballot. Surely this cannot be said to be due process.

As to whether petitioner was afforded due process, the record reflects the following:

Witness Jean D. Muirhead:

"Q. Were you at any time officially notified by the Hinds County Democratic Executive Committee that your right to have your name placed on the ballot had been challenged?

A. No, sir.

Q. The only notice you had was through a telephone conversation?

A. Yes. (R. 36)

• • •

Q. Did you appear before the Hinds County Democratic Executive Committee?

A. No. I was never notified of any challenge, and therefore, I did not appear. (R. 37)

• • •

Q. Did you protest to the Committee after you learned that your name would not be on the ballot?

A. Yes. I saw the Chairman on a television interview, and he said my name would not be on the ballot; that I had failed to file the necessary qualifying papers. I then attempted several times to call him on the telephone. I left my number with whoever answers his telephone. He did not return my call. I then wrote a certified letter to him as Chairman, asking him to explain to me what else I should have done that I did not do in order to have properly qualified. I have not yet received an answer to my letter. (R. 38)

• • •

Q. Have you been given any explanation by any members of the Committee as to why they refused to place your name on the ballot?

A. None whatsoever. The only thing I know is what I saw on television." (R. 40)

Witness James M. Ditto, Chairman, Hinds County Democratic Executive Committee:

"Q. If all the statutory provisions regarding placing one's name on the ballot are complied with, what is the procedure then?

A. Well, the Committee would certify them, for their name to appear on the ballot, . . . (R. 71)

Q. We come back to the original question, Jimmy, where, under the State Democratic Convention minutes or rules and regulations, do you get the authority to re-

quire a candidate to fill out this additional form, since last year it was not used?

A. Let's put it this way——

Q. This is the first year it's been used, right?

A. Yes . . . (R. 78, 79)

• • •

Q. . . . Is there anything in the State Convention rules and regulations which require the filing of this form, or is there any statutory authority which requires the filing of this form, if that's the basis for failing to register this lady?

A. I'm not familiar with the State Democratic Executive Committee minutes. (R. 79)

• • •

Q. Did your Committee notify any of these candidates that their name would not appear on the ballot?

A. I'm not—I don't believe Mrs. Kelly did. I don't know exactly what action she took in regard to that. I don't know whether she personally notified them or what. (R. 84)

• • •

Q. Did the Committee receive any written challenges as to Mrs. Muirhead's candidacy?

A. I didn't see any. I don't know. I don't think so." (R. 85)

Witness Robert L. Vaughn, Secretary Mississippi Democratic Executive Committee:

"Q. Were there any rules and regulations or other procedures regarding candidates' qualifications adopted by the Convention?

A. No, sir. . . . (R. 97)

• • •

Q. It's your statement that the Mississippi Democratic Party has no requirements other than those set out in the Code?

A. Other than what is set out in the Code.

Q. Has the Committee ever delegated to any county executive committees the right to set qualifications?

A. Other than what's in the Code, no." (R. 97, 98)

Witness Mrs. Doris Kelly, Secretary, Hinds County Democratic Executive Committee:

"Q. Did you ever notify this petitioner——

A. I did not.

Q. ——that she had not qualified?

A. I did not." (R. 120)

Witness John Wright, Member, Hinds County Democratic Executive Committee:

"Q. Was there any notice given Mrs. Muirhead that her right to appear on the ballot had been challenged?

A. I have no personal knowledge.

Q. Did you in any way contact her?

A. I did not. (R. 131)

• • •

Q. I notice that on June 15th, 1971, John, that the Committee voted to exclude the Petitioner here from the ballot. Was notice given to her that day?

A. That she was being excluded from the ballot that day?

Q. That's right. It was voted at your meeting of June 15th, according to the minutes. Was she notified that day that she had been excluded?

A. I have no knowledge of it.

Q. Prior to the June 15th meeting, did you or any agent of the Committee notify her that this action would be taken or considered? In other words, did she have notice that her qualifications were in question?

A. I did not tell her one way or the other, and I have no knowledge of anyone else telling her one way or the other." (R. 135, 136)

Witness Joe Treloar, Member, Hinds County Democratic Committee:

"Q. How many years have you been sending out the form?

A. . . . to my knowledge this is the only time that I know the form has been sent out. (R. 171)

• • •

Q. The Committee voted to disqualify the Petitioner here on June the 15th, as reflected by the minutes, because she had not filled out this form. Was any notice given to her of the meeting . . .?

A. I did not, . . ." (R. 171)

"A fair trial in a fair tribunal is a basic requirement of due process . . . (T)o perform its high function in the best way, 'justice must satisfy the appearance of justice . . .'" **Estes v. Texas**, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1966). Petitioner would respectfully assert that she was not given a fair trial in a fair tribunal other than in the Hinds County Circuit Court, whose judgment was subsequently overturned by the Mississippi Supreme Court.

B. **The Mississippi Supreme Court Ignored the Federal Voting Rights Act and an Injunction Restraining Mississippi From Making Any Changes in Its Election Procedures From Those in Effect in 1964.**

Petitioner adequately presented to the Mississippi Supreme Court the federal questions of noncompliance with the 1965 Federal Voting Rights Act and an injunction emanating therefrom in **Evers v. State Board of Election Commissioners, et al.**, 327 Fed. Supp. 640 (1971), but the Mississippi Supreme Court does not appear to have dealt with these questions at all.

Petitioner would show that only the State Democratic Convention has authority to establish election procedures

other than those provided by legislative enactment, and the record shows that the State Democratic Convention neither considered nor approved the form used by the respondents. It was never approved by appropriate federal authority. It was used only by Hinds County and for the first time in 1971. Candidates were not told they must complete it in order to qualify.

C. The Mississippi Supreme Court Ruled That Petitioner Waived Her Constitutional Rights. Petitioner Asserts That She Had No Knowledge or Notice and Thus, Did Not Waive Her Right to Due Process.

Petitioner was not given notice that the form in question had to be completed in order to qualify as a candidate. She was never notified that her right to appear on the ballot was being challenged. She was never given an opportunity to be heard by the respondents. She was never officially notified that her name would not appear on the August 1971 Democratic primary ballot. Mississippi law provides that when a candidate has complied with statutory procedures for qualifying, respondents' function is to place said candidate's name on the ballot. If respondent felt aggrieved by having to perform its ministerial function, it could have sought relief by applying to the state's Circuit Court and had a determination on the merits as to whether petitioner's name should appear on the ballot. This procedure was not followed.

CONCLUSION

Petitioner respectfully submits that a review of the record would indicate that this petition for a writ of certiorari should be granted; that the judgment of the Mississippi Supreme Court overturning the judgment of the Circuit Court, First Judicial District, Hinds County, Mississippi, should be set aside; that the results of the August 1971 Democratic primary for the senate post involved here should be set aside and a new election ordered; that petitioner, as the incumbent at the time of said election be declared to have held over until such time as a new election can be held; and that respondents be assessed with all costs herein.

Respectfully submitted

JEAN D. MUIRHEAD
Petitioner

By .....
MERRIDA P. COXWELL
Attorney for Petitioner

APPENDIX A

In the Circuit Court of the First Judicial District
of Hinds County, Mississippi

Jean D. Muirhead — Petitioner

vs. No. 20,597

Hinds County Democratic Executive Committee, James M. Ditto, Chairman — Respondents

ORDER

This day this cause came on to be heard on the Petition for a Writ of Mandamus to direct the Hinds County Democratic Executive Committee to certify Petitioner, Jean D. Muirhead, as a candidate for nomination for Senate Post 5 in the forthcoming Democratic primary election.

Petitioner and Respondents presented evidence, and the facts are undisputed that on May 11, 1971, pursuant to Section 3118.5 of the Mississippi Code of 1942, as amended, Petitioner filed an affidavit with the Circuit Clerk of Hinds County, Mississippi relative to the Corrupt Practices Act. That on June 3, 1971 Petitioner paid the qualifying fee to Mrs. Doris Kelly, Secretary of the Democratic Executive Committee for Hinds County. That this check was cashed and a receipt was given from Mrs. Doris Kelly to Petitioner. That under the terms of the applicable sections of the Mississippi Code, Petitioner thereby qualified to run as a Democrat in the Democratic Primary.

Subsequent thereto, and prior to June 15th, the Hinds County Democratic Executive Committee caused to be mailed to Petitioner a form, which is an exhibit in this cause, which would advise the Committee of the name, address, etc. relative to this and other candidates. This form was mailed to all candidates for office on the district

and county level. Petitioner did not complete or return this form to the Hinds County Democratic Executive Committee and, in fact, on June 19th, the last day for filing intent to seek office, Mrs. Doris Kelly, Secretary of the Committee, called and asked if she were going to mail it in, to which Petitioner said No.

Without oral or written notice to Petitioner, the Hinds County Democratic Executive Committee met on June 15, 1971 and, upon motion by one of the members, for the reason that Petitioner's questionnaire had not been completed and filed with the Committee, Petitioner was not certified to run in the Democratic Primary. This action was taken without Petitioner having an opportunity to appear before the Committee, without notice of the meeting, and without advising Petitioner or any other potential candidate that the completion of this form was a requirement by said Hinds County Democratic Executive Committee.

Even after such action, the undisputed fact is that Petitioner was not advised by the Secretary or any other member of the Committee that she had been rejected as a candidate for reelection on the Democratic ticket.

According to Petitioner's testimony, which is undisputed, some time between June 15 and June 19 she had been unofficially advised that said Executive Committee was not going to certify her as a candidate for reelection on the Democratic ticket. Therefore, on Saturday morning, June 19, five minutes prior to the deadline for a candidate to qualify, either under the Republican or Democratic Party label, she filed the necessary affidavit with the Circuit Clerk of Hinds County of her intent to seek such as a Republican, and paid the qualifying fee with the Secretary of the Republican Executive Committee. Her undisputed testimony was that she qualified to run as a Republican because she had been unofficially advised that she was not going to be permitted to run as a Democrat.

Petitioner testified that on numerous occasions she attempted to call the Chairman of the Hinds County Democratic Executive Committee, James M. Ditto, seeking to determine her position and later seeking to determine why she had not been certified, but was unable to reach Mr. Ditto or have him return her calls. That she wrote to Mr. Ditto by Certified Mail, requesting that he or the Committee advise her in writing of why the Committee refused to certify her as a candidate for the Democratic nomination. Mr. Ditto and the Committee apparently refused or chose to ignore the Petitioner's request, and as of the date of this trial had not responded in any way to Petitioner's numerous requests for reasons.

While the minutes of the Hinds County Democratic Executive Committee do not reflect any basis other than the failure to complete this form, a requirement which is not set forth in the statutes of the State of Mississippi nor authorized by the Mississippi State Democratic party, of which this Executive Committee is a creature, as the reason for denying Petitioner's right to appear as a Democratic nominee, there was some testimony to the effect that there had been oral complaints that Petitioner was a member of the Republican Party or did not meet the requirements of Section 3107-05. No written complaint against Petitioner was ever filed by anyone with the Hinds County Executive Committee as to her party affiliation or other necessary qualifications. Therefore, if the Committee had acted for reasons other than as set out in its minutes, then such Committee acted on the rankest of hearsay and again without notice to Petitioner. It is almost unbelievable that a body such as this would conduct a hearing behind closed doors without at least giving the party being considered so much as an opportunity to be present and, even after so acting, failing to notify said applicant of their action except via the news media several days after the date for qualifying as a candidate had passed.

• • •

The writ of mandamus is an extraordinary writ, and one which this Court and other courts issue with extra precaution. And in the instant case the Court is of the opinion that the only remedial process which this Petitioner might have is by the writ of mandamus. Therefore, the Court is of the opinion that it has jurisdiction of this cause. 52 Am Jur 2d, Section 315, etc.

• • •

. . . (I)t is the opinion of this Court that it may order the Committee to do that which the law requires it so to do. And in the instant case, Petitioner having met all of the requirements of the Mississippi statutes relative to qualifying as a candidate for reelection under the Democratic Party, and having testified that she is and has been in accord with the declared principles of the Mississippi Democratic Party as evidenced by its Resolution adopted in 1968, that her name should be placed on the ballot in the Democratic Primary to be held in August, 1971; and the Court finds that the Hinds County Democratic Executive Committee usurped its authority in failing to so certify.

It is therefore ordered that the Hinds County Democratic Executive Committee cause to be placed on the ballot in the August 3, 1971 Primary the name of your Petitioner as a candidate for reelection to Senate Post Number 5, unless Petitioner file with said Hinds County Democratic Executive Committee a notice of her withdrawal by five o'clock, P.M., Monday, July 26, 1971.

Ordered and Adjudged this 23rd day of July, 1971.

/s/ RUSSEL D. MOORE
Circuit Judge

APPENDIX B

In the Supreme Court of Mississippi

No. 46,716

Hinds County Democratic Executive Committee, James Ditto, Chairman, Respondent/Appellant,

v.

Mrs. Jean D. Muirhead, Petitioner/Appellee.

Patterson, Justice:

This is an appeal from the Circuit Court of the First Judicial District of Hinds County wherein a writ of mandamus was directed to the Hinds County Democratic Executive Committee commanding it to certify Mrs. Jean Muirhead as a candidate for nomination to Senate Post No. 5 in the 1971 Democratic Primary election. The committee appeals from this judgment.

The record reveals that Mrs. Muirhead had been a candidate on the Hinds County Democratic ticket for the Mississippi Senate in 1968 and was elected to this office. In 1969 she issued a statement expressing her disenchantment with the Democratic Party and indicated an intention to seek reelection on the Republican ticket.

On May 9, 1971, after deciding to seek another term in the Mississippi Senate, appellee filed a corrupt practices affidavit with the Circuit Clerk of Hinds County in conformity with Mississippi Code 1942 Annotated section 3158.3 (1956). On June 3, 1971, Mrs. Muirhead paid her qualifying fee as a prospective candidate to the Secretary of the Hinds County Democratic Executive Committee as required by Mississippi Code 1942 Annotated section 3121 (1956).

The Hinds County Democratic Executive Committee required that a form be completed by all candidates which was additional to those procedures required by statute and by the State Democratic Executive Committee for certification. This form, in pertinent part, sought to determine whether Mississippi Code 1942 Annotated section 3107-05 (1956), relating to misrepresentation as to party membership, had been violated. This section provides:

> If any person shall claim, or represent himself to be a member of a primary political party during any primary election campaign or during any primary election when in fact such person is not eligible under the laws of this state to participate in such primary held by such political party and such person does not intend to support the nomination to be made at such primary election of such political party and such person has not been in accord with such political party holding such primary within the two preceding years, or any part thereof, such person shall be barred from participating in such primary, and in addition to such other measures or penalties provided by law, may be enjoined therefrom upon application to the courts by any person or persons, political party, official or representative of such political party, aggrieved thereby.

Each candidate was requested to complete and return the form not later than June 14, 1971. The appellee refused to do so and notified the Executive Committee of her decision.

The committee met on June 15, 1971, and unanimously voted not to certify the appellee as a candidate in the August 1971 Democratic Primary. The probability of not being able to compete as a candidate in the Democratic Primary influenced Mrs. Muirhead to qualify on June 19, 1971, as a candidate on the Republican ticket.

Subsequent to her election to qualify as a Republican candidate she nevertheless filed on July 13, 1971, a petition for a writ of mandamus seeking to compel the committee to place her name on the Democratic ballot for the August Primary. The lower court directed the mandamus to issue and thereafter denied a request for supersedeas, whereupon the committee sought and obtained a stay of judgment from this Court.

There would appear to be little doubt that the county executive committee is a quasi governmental body subject to suit and judicial review. Mississippi Code 1942 Annotated section 3105 (1956) is in part as follows:

> . . . The county executive committee at such primaries shall discharge the functions imposed upon the county election commissioners, except as to revising the registration and poll books, and shall be subject to all the penalties to which county election commissioners are subject. . . .

In **State Ex Rel Rice, Attorney General v. Dillon,** 197 Miss. 504, 19 So.2d 918 (1944), we held the power to determine whose name is entitled to appear on the ballot is vested in the election commissioners. Similarly, we think, the Hinds County Democratic Executive Committee is vested by Section 3105 with the power to determine whose name should appear on the party ballot. The exercise of this function is governed by Section 3107-05 appertaining to misrepresentation as to party membership. The terms of this section bestow upon the committee a discretion in concluding whether a person "shall be barred from participating in such primary" by reason of violation of Section 3107-05. Surely this determination, a fact-finding process, is not a mere ministerial act to be perfunctorily performed, but rather is, as it must be by the terms of the statute, a fact-finding process necessitating the use of discretion in arriving at a conclusion. This de-

termination is subject to judicial review. Miss. Code 1942 Ann. §§ 1206 and 1207 (1956). **See also** § 3228 (1956).

The question is thus presented, whether the lower court erred in issuing mandamus at the time the appellee had a statutory right of appeal.

The proper function of mandamus is to supply a remedy for inaction on the part of an official or commission to whom it is directed. It is not a substitute for, nor intended to serve, the purpose of other modes of review. It can direct an official or commission to perform its official duty or to perform a ministerial act, but it cannot project itself into the discretionary function of the official or the commission. Stated differently, it can direct action to be taken, but it cannot direct the outcome of the mandated function. In **City of Jackson v. McPherson**, 158 Miss. 152, 155, 130 So. 287, 288 (1930), this rule is well stated as follows:

> It is not within the purposes of a writ of mandamus to direct an inferior tribunal to decide an issue of fact in a particular way, when the law has invested that tribunal with original jurisdiction to decide the question for itself. If this were not the rule, the determination of issues of fact, although committed to many different officers and boards in the first instance, would be only advisory to the courts, and local government of all grades would or could be absorbed by and transferred to, the courts—a proposition obviously contrary to the frame and structure of civil government in this country, and impolitic and impracticable to the last degree. In such cases, where as to the facts there exists any admissible doubt, or in respect to which reasonable men might conscientiously differ, the courts have, with a practical unanimity, declined to interfere by mandamus. . . .

The action of the Hinds County Democratic Executive Committee in barring the appellee's name from being

placed upon the Democratic ballot for its primary of August 1971 was within its lawful authority. The appellee is therefore not aggrieved by inaction of the committee, but rather with the decision which it made barring her name from being placed on the ballot. The remedy arising from the suggested error on the part of the Executive Committee was by way of appeal in compliance with statute and decision of this Court [Powe v. Forrest County Election Commission, 249 Miss. 757, 163 So.2d 656 (1964)] rather than an election to qualify as a Republican candidate and to invoke the extraordinary writ of mandamus. The appellee, in our opinion, in electing to qualify as a Republican candidate, abandoned her privilege to remain a candidate on the Democratic ballot. The two positions are incompatible and though, it is contended, an appeal from the committee's order would be too time-consuming to afford an effective remedy for the assigned error, we nevertheless conclude that this overlooks the policy of this state whereby matters of public interest are subject to being advanced on appeal on proper motion therefor. The appellee was afforded due process of law by the right to a hearing before the committee, by mandamus if necessary, and the right to appeal fortified by advancement on the appellate docket due to public interest. However, this constitutional right of due process was waived, in our opinion, when the appellee elected to forego the appeal and sought instead remedy by affiliating with the Republican Party, for certainly her name could not contemporaneously appear on both party tickets as a candidate.

We are of the opinion that the lower court erred in issuing the writ of mandamus.

Reversed and rendered.

Rodgers, P. J., and Inzer, Smith and Robertson, JJ., concur.

APPENDIX C

In the Supreme Court of Mississippi

Monday, March 20, 1972, Court Sitting

Hinds County Democratic Executive Committee, James Ditto, Chairman.

No. 46,716 vs.

Mrs. Jean D. Muirhead.

This cause having been submitted at a former Term of this Court on the record herein from the Circuit Court of the First Judicial District of Hinds County and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 23rd day of July 1971— be and the same is hereby reversed and the writ of mandamus set aside and denied. It is further ordered and adjudged that the appellant do have and recover of and from the appellee all of the costs in this Court and in the Court below to be taxed for which let proper process issue. Minute Book "BP" Page 537

APPENDIX D

In the Supreme Court of Mississippi

Monday, April 10, 1972, Court Sitting

Hinds County Democratic Executive Committee, James M. Ditto, Chairman.

No. 46,716 vs.

Mrs. Jean D. Muirhead.

This cause this day came on to be heard on the petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition be and the same is hereby denied.

Minute Book "BP" Page 553

APPENDIX E

RULES OF THE SUPREME COURT OF MISSISSIPPI

Rule 32

Remedial Writs

No application for supersedeas, or any other writ or remedial process mentioned in section 1657, Mississippi Code 1942 Annotated (1956), except in cases of greatest emergency, shall ever be acted on, in any case pending in any court, by any member of the Supreme Court, ex parte; but every such application, except in cases of greatest emergency, shall be accompanied by a certificate of written notice served on the opposite party, or his counsel, or some of them, at least three (3) days before the hearing; and all such applications will be acted upon only when both sides are represented at the hearing, or after such three days notice duly certified as above. Except in cases of emergency, the application for any remedial writ shall first be submitted to the judge of the appropriate trial court. Application to a Supreme Court Judge for any remedial writ shall be under oath by counsel for applicant. It shall state the name and office of the judge or Supreme Court Justice to whom it was first submitted, his denial of it, and the reasons, if any, given by him for its denial, and shall have attached thereto a certified copy of the trial judge's order, if any, denying the writ.

APPENDIX F

I, ..., of ....., am a
(Name) (Address)
candidate for ..... I am a
(Office) (District) (Post)
legally qualified voter in the ..... precinct, and of the ..... District.

I HAVE NOT been convicted of a crime as defined in the Constitution for holding public office.

I HAVE NOT qualified with any other party to be a candidate for the office I seek in the August Democratic primary and I have fully complied with, and HAVE NOT violated the requirements of Section 3107-05—"Misinterpretation as to party membership".

.....

This form should be completed, signed, and returned to the Hinds County Democratic Executive Committee, not later than Monday, June 14th. This Committee will meet at 10:00 a.m. on Tuesday, June 15th, to certify all candidates.

Return to:
Mrs. Doris P. Kelly
Secretary
Hinds County Democratic Executive Committee
531 First National Bank Building
Telephone 948-2124

ILE CO

Supreme Court, U. S.
FILED
JUL 27 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1688

JEAN D. MUIRHEAD,
Petitioner,

vs.

HINDS COUNTY DEMOCRATIC EXECUTIVE COMMITTEE,
JOHN HULSEBOCH, Successor to J. M. DITTO,
Respondents.

Brief in opposition by Respondent

BRIEF IN OPPOSITION ~~REPLY~~

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of The State of Mississippi

MALCOLM B. MONTGOMERY
315-321 Barnett Building
P. O. Box 1288
Jackson, Mississippi 39205
Attorneys for Respondents

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BRIEF IN OPPOSITION-REPLY

STATEMENT OF THE CASE

Petitioner states in her statement of the case that the Democratic Executive Committee refused to place Petitioner's name on the 1971 Democratic ballot on the ground that she failed to complete a form submitted to her by the Committee. We wish to correct this statement. The United States District Court enjoined the Respondents in **Charles Evers, et al vs. State Board of Election Commissioners** to hold the election under the laws in force and effect on November 1, 1964.

Section 3107-5 Code of 1942 (Exhibit A hereto) was in effect on November 1, 1964, and provides that any person who has not been in accord with the party holding the primary within the last two preceding years or any part thereof shall be barred from participating in such primary.

The petitioner testified on page 43 as follows:

"Governor, as I recall, about two years ago, I held a press conference in which I made the statement that when and if I sought re-election, I intended to do so as a Republican."

She then testified: (lines 9 to 12, p. 44 of Record)

Q. "Well now was that your intention from then on for how long?

A. It was my intention at that point.

Q. When did you change your mind?

A. I haven't changed my mind."

The questionnaire sent to petitioner by the respondents to be signed by her contained the statement:

"And have not violated Section 3107.5."
(Page 50 of the Record)

Petitioner was then asked:

"I did not complete it and return it," referring to the questionaire sent her by the Committee (R 50).

Q. "Did you attend the regular party meeting for Vice-president Agnew?

A. Yes sir.

Q. When was that?

A. There have been two dinners here in the past couple of years and I have been to both of them.

Q. Did you go as a Republican or a Democrat?

A. As a Republican."

Then on page 54 of the Record she testified:

Q. "Were you recognized at the meeting?

A. Yes sir.

Q. As a Republican Senator?

A. Yes sir."

In her letter of June 23, 1971, she stated:

"Since I will not be on the August ballot, will you kindly return my $15.00. Thank you for your co-operation" (R 39).

Petitioner qualified as the Republican nominee on June 25, 1971 (R. 59) and on pp. 63 and 64 testified that under the law there was nothing to prevent her from being on both ballots.

It is clear from the evidence that petitioner did not meet the qualifications for a Democratic candidate under 3107-5 but proves that she was barred as a candidate by Section 3107-5 by her own testimony.

DECISIONS CITED BY PETITIONER AS REASONS FOR GRANTING THE WRIT

The decision in **Allen vs. State Board of Elections, 393 U. S. p. 544, 89 S. Ct. 817,** cited by the petitioner has no application here. In that case the question to be decided was whether the state enactment was subject to the voting rights act of 1965 and required to be submitted for approval. In the case at bar the District Court held in **Evers et al vs. State Board of Election Commissioner, 327 T. Supp. 640** that the submission had not been approved by the Attorney General and that the laws in effect on November 1, 1964, were the standard and enjoined the commission to proceed under the laws in effect on November 1, 1964, and this the commission did.

Estes vs. State of Texas, 381 U.S. 532, 85 A.S.C. 1628 where defendant was tried and convicted of swindling and it was held that he was deprived of due process of law because the hearing was televised live and repeated on tape in the same evening reaching approximately 100,000 viewers and the Courtroom was a mass of wires, television cameras, microphones and photographers. There is no comparison in that case with the case at bar. Here there were no cameras, microphones, photographers, etc. and no outside influence. It has no application here.

Petition cites **Giascio vs. State of Pennsylvania, 382 U.S. 399, 86 S. Ct. 518.** This is a case where the jury imposed costs on defendant acquitted of a misdemeanor charge and the Supreme Court held same to be a violation of due process because of vagueness and absence of any standard sufficient to enable defendants to protect themselves against arbitrary and discriminating impositions of costs. The case has no application here.

In **Glosser vs. U.S. 315 U.S. 60, 62 S. Ct. 457,** an Illinois statute made women eligible as jurors effective on July 1, 1930, and the grand jury which presented the indictment

was summoned on August 25, 1930, was composed of men only, and it was not shown that women's names had yet appeared on state jury lists. The Court held it was no error to omit names of women jurors from federal jury lists even though **28 U.S.C. Section 411, 28 U.S.C.A. 411** provides in substance that jurors in a federal court are to have the qualifications of jurors in the highest court of the state. Here, in the case at bar, there was no discrimination anywhere depriving Mrs. Muirhead of any constitutional right.

Petitioner cites **Brookhart vs. Janis, 381 U.S. 1, 86 S. Ct. 1245** the Supreme Court held that where the record did not establish that defendant, who emphasized in open court that he was not pleading guilty, had intelligently and knowingly waived right to confront and cross-examine witnesses, although his attorney agreed to "prima facie trial" which was practical equivalent of guilty plea and in which defendant did not have right to confrontation and cross examination.

ARGUMENT

Answering petitioner's argument that the Judgment below ignores petitioner's rights under the Fourteenth Amendment.

The petitioner was asked the question while on the witness stand:

> Q. Did you receive a written memorandum or request from the Hinds County Democratic Executive Committee asking you to fill out an application?
>
> A. Yes I did. (R 48)
>
> Q. Now look that over and see if that is the kind of form you received?
>
> A. Yes it is." (R 49)
>
> "By Mr. Barnett:
>
> We ask that this be marked as an exhibit to the testimony of Senator Muirhead. Respondents Exhibit "A" (R 49)

Respondents exhibit A in its last paragraph reads:

> "I have not qualified with any other party to be a candidate for the office I seek in the August Democratic Primary and I have fully complied with and have not violated the requirements of Section 3107-5, misrepresentation to party membership."

This certainly put this petitioner on notice of the provisions of Section 3107-5 which, in the part thereof applicable here reads:

> ". . . and such person has not been in accord with such political party holding such primary within two preceding years, or any part thereof such person shall be barred from participating in such primary. . ."

"The law imputes knowledge when opportunity and interest combined with reasonable care would necessarily

impart it. **Booth Fisheries Corporation vs. Coe, 114F2d462, 72 app D.C. 195, Certrorari derived 61 S. Ct. 72, 311 U.S. 691, 85 L. Ed. 447** – "Actual knowledge consists not only of what one certainly knows, but also consists of information which he might obtain by investigating facts which he does know and which imposes on him duty to investigate." **Smith vs. Pacific Mutual Life Insurance Company, 192 F 2d 248.**

Petitioner's attention was called by such questionnaire to Section 3107-5 of the code and informed her that since she had been a Republican for two years, she was barred from being a Democratic candidate. She needed no further notice that her right for her name to be placed on the ballot had been forbidden and was barred because according to her own statement under oath she has been a Republican for two years. She did receive official notice that she was barred as a Democratic candidate and was officially notified by Section 3107-5 that she had no right to have her name placed on the ballot, and she knew this and did not sign and return the application.

The Supreme Court of Mississippi held that **Section 3105 Code of 1942,** and in effect on November 1, 1964, gave the Hinds County Democratic Executive Committee power to determine whose name should appear on the party ballot. (PA-7) of Petition for Certrorari. This clearly establishes that the Supreme Court of Mississippi did not ignore or deprive petitioner's rights under the Fourteenth Amendment.

B. Now answering Petitioner's argument under point "B" that the Supreme Court ignored the Federal Voting Rights Act and an injunction restraining Mississippi from making any changes in its election procedures from those in effect in 1964.

In answering let us say that the Supreme Court did not ignore the Federal Voting Rights Acts nor did it ignore

the injunction restraining Mississippi from making any changes in its election procedures from those in effect on November 1, 1964.

It is true that the Legislature had in 1970 repealed sections 3105 and 3107.5 but under **Evers et al vs. State Board of Election Commissioners et al, 327 Fed. Supp. 640,** the U.S. District Court held:

> "The plaintiffs are entitled to an immediate injunction against defendants in their official capacities restraining any enforcement of House Bills 362 and 363 of the Mississippi Legislation 1970 Regular Session, and requiring the immediate pending general elections to be held under the laws of the State of Mississippi which were in force and effect on November 1, 1964."

Mrs. Muirhead is a white lady and she received notice from the Respondents that her name would not be on the Democratic ballot. At page 36 of the record she testified:

> "Q. Were you at any time officially notified by the Hinds County Democratic Executive Committee that your right to have your name placed on the ballot had been challenged?
>
> A. No sir.
>
> Q. The only notice you had was through a telephone conversation?
>
> A. Yes." (R 36)

Then in her letter to the chairman of the Hinds County Democratic Executive Committee, dated June 23, 1971, Mrs. Muirhead stated:

> "Since I will not be on the August ballot, would you kindly return my $15.00?" (R 39)

It is clear from the record that there was no concealment by the Committee, no ignoring of the Federal Voting

Rights Act, and no ignoring of Petitioner's rights under the Fourteenth Amendment.

C. Now answering petitioner's argument that the Mississippi Supreme Court ruled that petitioner waived her constitutional rights, petitioner asserts that she had no knowledge or notice and thus did not waive her right to due process.

In response let us say that the questionaire sent to petitioner expressly asked her if she had complied with Section 3107.5 which barred her as a candidate according to her own testimony as set out above and she was thus given notice that she was not acceptable as a candidate. She also was given notice that she had been challenged and on page 39, she stated in her letter to the committee that she knew on June 23, 1971, that her name would not be on the ballot. What further notice did the law require? She had full knowledge on June 19, 1971, that her name would not be on the Democratic ballot when she executed her Corrupt Practice Act affidavit. (R 56).

The decision of the Supreme Court of Mississippi has decided this case in full accord with applicable decisions of this Court and under Rule 19, a Writ of Certiorari will not be granted.

We refer the Court to Rule 19 of this Court, where it is declared that a Writ of Certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor.

The facts are that the primary election was held on August 3, 1971, and Mrs. Muirhead was defeated.

CONCLUSION

Respondent respectfully submits that the record in this case reflects that Mrs. Muirhead, a white lady lawyer, knew that she had been affiliated with the Republican party for the preceding two years, and so admitted on the witness stand and also knew that she was barred by Section 3107-5 from having her name placed on the ballot. She was not denied due process of law at any time or in any manner.

Her case was heard and decided by the Supreme Court of Mississippi in such manner as the settled maximums of the law permit and sanction, and under such safeguards for the protection of individual rights as those maximums prescribe for the class of cases to which this case belongs. Search the record, as we may, and no instance of lack of due process may be found.

Respectfully,

HINDS COUNTY DEMOCRATIC EXECUTIVE COMMITTEE, RESPONDENTS

BY: Malcolm B. Montgomery

MALCOLM B. MONTGOMERY, ATTORNEY FOR RESPONDENTS

BARNETT, MONTGOMERY, McCLINTOCK & CUNNINGHAM
P. O. Box 1288
Jackson, Mississippi 39205

APPENDIX A

Mississippi Code of 1942, Section 3105, Mode of nominating state, district county and county district officers:

"All nominations for state, district, county and county district officers made by the different parties of this state, shall be made by primary elections. All primary elections shall be governed and regulated by the elections laws of the state in force at the time of the primary election is held, except as herein provided. The county executive committee at such primaries shall discharge the functions imposed upon the county election commissioners, except as to revising the registration and poll books and shall be subject to all the penalties to which county election commissioners are subject. The primary election officers appointed by the executive committee of the party shall have the powers and perform the duties, where not otherwise provided, required of such officers in a general election, and any and every act or omission which by law is an offense when committed on or about, or in respect to such general elections, shall be an offense if committed in or about or in respect to a primary election; and the same shall be indictable and punishable in the same way as if the election was a general election for the election of state and county officers except as specially modified or otherwise provided in this chapter."

Mississippi Code of 1942, Section 3107-5, Misrepresentation as to party membership:

"If any person shall claim, or represent himself to be a member of a primary political party during any primary election campaign or during any primary election when in fact such person is not eligible under the laws of this state to participate in such primary held by such political party and such person does

not intend to support the nominations to be made at such primary election of such political party and such person has not been in accord with such political party holding such primary within the two preceding years, or any part thereof, such person shall be barred from participating in such primary, and in addition to such other measures or penalties provided by law, may be enjoined therefrom, upon application to the courts by any person or persons, political party, official or representative of such political party, aggrieved thereby."